86-831

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

SAM RICHARDSON, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether federal courts should give collateral estoppel effect to the factfindings of a state administrative agency, entered after an adjudicatory proceeding and affirmed on appeal by a state court – particularly when the only difference between the administrative agency action and the federal case is the nature of the relief sought by respondents.

2. Whether federal courts should apply federal principles of issue preclusion to the factfindings of a state administrative agency, entered after a full and fair adjudicatory proceeding, in order to avoid unnecessary relitigation of the same factual issues in the federal courts.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioner Phillips Petroleum Company and respondents Sam Richardson, Jr., J.S. Beebe, J.S. Beebe, Jr., Joe R. May, Jack Washington, and Berg, Laney and Brown (a partnership). Petitioner believes that Jack Washington no longer has an interest in the outcome of the case and, therefore, he has been omitted as a named respondent in this petition.

Petitioner has no parent corporation. Petitioner's affiliates and subsidiaries (other than wholly-owned subsidiaries) are listed in Appendix J, p. 52a, *infra*.

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2. Because of the federal judiciary's burgeoning dockets, the court below erred in failing to apply federal principles of issue preclusion in order to avoid unnecessary relitigation in the federal courts of the same factual issues previously determined in a state administrative adjudication. 11

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PHILLIPS PETROLEUM COMPANY,
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v.

SAM RICHARDSON, JR., J.S. BEEBE,
J.S. BEEBE, JR., JOE R. MAY, and
BERG, LANEY AND BROWN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Phillips Petroleum Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, finally entered in the above-entitled proceeding on August 25, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 791 F.2d 641 and is reprinted in Appendix A, p. 1a, *infra*. The Eighth Circuit's order with opinion denying the petition for rehearing *en banc* and for rehearing by the panel is reported at 799 F.2d 426 and is reprinted in Appendix B, p. 18a, *infra*.

The memorandum decision of the United States District Court for the Western District of Arkansas (Overton, D.J.) has not been reported. It is reprinted in Appendix E, p. 24a, *infra*. The Western District's order dismissing the action is reprinted in Appendix C, p. 21a, *infra*.[1]

JURISDICTION

Invoking federal diversity jurisdiction under 28 U.S.C. §1441(a) and (b) and 28 U.S.C. §1331, petitioner removed this action initiated by respondents in state court to the Western District of Arkansas. On December 6, 1984, the Western District granted petitioner's motion to declare certain facts etablished by collateral estoppel. Respondents filed their amended complaint on December 12, 1984, and thereafter the Western District dismissed the action on December 13, 1984.

On respondents' appeal pursuant to 28 U.S.C. §1291, the Eighth Circuit on May 23, 1986, entered a judgment and an opinion reversing the Western District and directing that the matter proceed to trial. The Eighth Circuit denied petitioner's request for rehearing on August 25, 1986.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

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[1]Also reprinted in the appendix are the following: Amended Complaint filed by respondents in the Western District, Appendix D, p. 23a, *infra;* Order and Judgment of the Circuit Court of Union County, Arkansas, dated December 27, 1982, Appendix F, p. 31a, *infra;* Order of the Arkansas Oil and Gas Commission dated October 25, 1979, Appendix G, p. 33a, *infra;* Application of Sam Richardson, Jr., *et al.* to the Arkansas Oil and Gas Commission, Appendix H, p. 43a, *infra;* Order of the Arkansas Oil and Gas Commission dated March 15, 1976, Appendix I, p. 46a, *infra*.

STATEMENT OF THE CASE

The issues in this case involve important aspects of judicial administration regarding collateral estoppel, perhaps better known today as issue preclusion. These questions arise in the context of an oil and gas case.

Respondents twice brought adjudicatory proceedings[2] before the Arkansas Oil and Gas Commission (the "State Commission") contending that petitioner's unitized secondary recovery project was damaging respondents' neighboring oil and gas operations. Under Arkansas law, respondents had an option to bring a state court action against petitioner for both injunctive relief and money damages without first seeking relief from the State Commission.[3] At the conclusion of the second adjudicatory hearing, held in 1979, the State Commission unanimously denied respondents' application for relief and found that petitioner's operations neither endangered nor otherwise damaged the operations of respondents.[4] Respondents appealed the 1979 State Commission decision to a state court, which subsequently affirmed the agency decision.[5]

Next respondents brought a tort action in Arkansas state

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[2]Order of the Arkansas Oil and Gas Commission dated March 15, 1976, p.46a, *infra;* Application of Sam Richardson, Jr., *et al.* to the Arkansas Oil and Gas Commission, p. 43a, *infra.*

[3]*See Christmas v. Raley,* 260 Ark. 150, 539 S.W.2d 405 (1976).

[4]Order of the Arkansas Oil and Gas Commission dated October 25, 1979, p. 33a, *infra.*

[5]Order and Judgment of the Circuit Court of Union County, Arkansas, dated December 27, 1982, p. 31a, *infra.* In affirming the State Commission decision, the state court determined that "[t]here is substantial evidence to support *the finding* of the Commission, on conflicting evidence, that [petitioner's] unit operations herein *do not adversely affect* [respondents]." (Emphasis added.) *Id.*, p. 32a, *infra.*

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court making exactly the same allegations against petitioner that they had litigated in the 1979 state administrative agency adjudication. Petitioner removed the action to the Western District of Arkansas and moved for summary judgment on the grounds, *inter alia,* that the necessary factfinding already had been adjudicated in a state administrative proceeding, that the factfindings of the State Commission had been affirmed in state court, and that these findings were entitled to preclusive effect in the federal district court under principles of collateral estoppel.

The District Judge denied petitioner's motion for summary judgment but held as follows:

> Even though the prior adjudications before the Oil and Gas Commission did not involve a claim for damages, at least the findings of fact and issues necessarily decided must be given collateral estoppel effect in the instant lawsuit.[6]

The District Judge directed respondents to file an amended complaint "alleging with specificity any issues which are not barred by the preclusive effect of the collateral estoppel ruling in this order."[7]

Respondents amended their complaint by stating that they were unable to allege with specificity any issues which were not barred by the preclusive effect of the Judge's ruling.[8] The District Judge then dismissed respondent's action as being barred by collateral estoppel.[9]

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[6]Memorandum Decision of the Western District of Arkansas, p. 29a, *infra.*

[7]*Id.*, p. 30a, *infra.*

[8]Amended Complaint, p. 23a, *infra.*

[9]Western District's order dismissing the action, p. 21a, *infra.*

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On appeal to the Eighth Circuit, neither party briefed nor argued the question whether the factual issues presented in the District Court were different in nature from the factual issues presented in the State Commission. Respondents argued instead (i) that the state findings should not be given preclusive effect in the District Court because they resulted from an administrative hearing before the State Commission, which had no authority to award damages, and (ii) that the state court had indicated that respondents' right to proceed against petitioner for damages was not affected by the action of the State Commission.

In reversing the District Court, a majority of the panel of the Eighth Circuit stated:

> After reviewing the record and applicable Arkansas law, we find that the district court erred in failing to conclude that there is not a sufficient identity of issues between those distinctly litigated and necessarily decided in the Commission hearings and the issues raised in the state law proceedings to allow application of the collateral estoppel doctrine here.

791 F.2d at 644, Appendix A, p. 7a, *infra.*

Although the Eighth Circuit ~~Circuit~~ did not challenge the District Court's finding that the State Commission proceeding was adjudicatory in nature, a majority of the panel concluded, after reviewing Arkansas law, that the inability of the State Commission to award compensatory damages prevented the findings of the State Commission from being entitled to preclusive effect in respondents' tort action. The majority also stated, *sua sponte,* that the burden of proof upon the respondents in their tort action would be different than their burden of proof before the State Commission, since the State Commission was con-

cerned with proof of "irreparable harm" in determining whether to enjoin petitioner's operations.[10]

Judge Fagg, dissenting, would have affirmed the District Court's decision under Arkansas principles of issue preclusion. He concluded that respondents raised and fully litigated before the State Commission the issue of whether petitioner had injured respondents. 791 F.2d at 648, Appendix A, p. 16a, *infra.*

On August 25, 1986, the Eighth Circuit denied petitioner's request for rehearing and rehearing *en banc.* 799 F.2d 426, Appendix B, p. 18a, *infra.* Four judges would have granted the rehearing *en banc.*

REASONS FOR GRANTING THE WRIT

I.

Supervisory review of this case is necessary to enforce repose in accord with the collateral estoppel principles articulated in *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), and recently reaffirmed in *University of Tennessee v. Elliott*, ____ U.S. ____, 106 S.Ct. 3220 (1986).

All the necessary facts at issue in this case were litigated by respondents during lengthy proceedings before the State Commission in 1979. Respondents sought injunctive

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[10]The State Commission's Order dated October 25, 1979, p. 33a, *infra,* gives no indication that it was limited to determining whether an "irreparable injury" had been inflicted on respondents; the State Commission's order speaks in terms of causation, not irreparable injury. Rather than finding that respondents had suffered less than an irreparable injury, the State Commission *specifically* found that respondent's oil operations had not been damaged or even endangered by petitioners. *Id.*, p. 39a, *infra.*

relief before the State Commission, alleging that petitioner's secondary recovery operations had damaged their oil operations.[11] In order to prevail before the State Commission, respondents necessarily had to show that petitioner's operations were the cause of any damage alleged by respondents. The State Commission denied relief and its findings and conclusions subsequently were affirmed on appeal by an Arkansas state court. These state adjudicatory proceedings may be diagrammed as follows:

STATE COMMISSION

Facts	**Factfindings**	**Remedy**
Evidence pro and con of damage to respondents' oil operations.	The evidence fails to prove that respondents' oil production "has been endangered or otherwise damaged" by petitioner's operations.	No injunctive relief entered against petitioner.

STATE COURT

Findings and conclusions of State Commission are affirmed.

[11]Application of Sam Richardson, Jr., *et al.* to the Arkansas Oil and Gas Commission, p. 43a, *infra.*

In federal district court, respondents attempted to relitigate precisely *the same facts* that were adjudicated before the State Commission. They sought *a finding opposite* of that made by the State Commission – *i.e.*, that there has been "damage" to their interests caused by the operations of petitioner. They also sought *a new remedy* – which admittedly was not available to them in the State Commission – *i.e.*, compensatory "damages."

The District Judge concluded that "at least the findings of fact and issues necessarily decided [by the State Commission] must be given collateral estoppel effect" in the District Court. This statement is black-letter law, squarely in line with this Court's decisions in *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), and *University of Tennessee v. Elliott*, ____ U.S. ____, 106 S.Ct. 3220 (1986). As this Court stated in *Utah Construction*, the seminal decision in this area:

> Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad . . . When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hestitated to apply *res judicata* to enforce repose. [384 U.S. at 421-422; footnotes omitted].

After concluding that the State Commission's factual findings were entitled to preclusive effect, the District Judge invited respondents to amend their complaint to allege any issues that had not been decided by the State Commission. Respondents amended their complaint and stated on the record *that there were no such issues.* Appendix D, p. 23a, *infra.* As respondents admitted both in the

District Court and in the Eighth Circuit, the only difference between the two proceedings was that their action in the District Court sought money damages. This difference should not deprive the state adjudicatory proceedings from having preclusive effect.

Petitioner contends, pointing to the *Utah Construction* and *Elliott* cases, that by admitting that there are no new issues to be litigated, respondents have stipulated themselves out of federal court. Respondents' failure to raise new allegations in their amended complaint is, in effect, a stipulation that there are none. The amended complaint should govern the disposition of this case. A majority of the panel of the Eighth Circuit failed to discuss respondents' amended complaint or its effect as a stipulation, although urged to do so by petitioner.[12]

In deciding this case, two judges of the Eighth Circuit, constituting a majority of the panel, erroneously focused upon the relief sought in the state administrative proceeding rather than the factual issues actually litigated therein. The threshold issue before both the State Commission and the federal district court was whether petitioner had damaged or harmed respondents – the issue was not what type of remedy would be appropriate.[13]

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[12]Respondents' amended complaint was discussed by the dissenting member of the Eighth Circuit panel, Judge Fagg, who viewed the amended complaint as an admission by respondents that all necessary factual issues were adjudicated in the state administrative proceedings. 791 F.2d at 648, Appendix A, pp. 15a-16a, *infra*.

[13]Respondents' counsel during the 1979 State Commission proceeding made the following statement on the record concerning the matter before the State Commission (1979 Transcript, p. 508, lines 15-20):

> The issue here is not the success or failure of this particular unit. I don't know whether it is a success, whether it is good, bad, indifferent or otherwise.

Nevertheless the Eighth Circuit erroneously decided that the "issue" before the District Court was not the same as the "issue" before the State Commission, because the State Commission only considered "whether a petroleum company's operations should be completely shut down." 799 F.2d at 427, Appendix B, p. 19a, *infra*. This improper focus on the remedy, rather than on the issue of whether petitioner caused damage to respondents[14] – the criticial question in the state proceeding – substantially weakens *Utah Construction* and *Elliott*. Most state administrative tribunals are limited in the types of relief they afford. This limitation in remedy does not alter the reality that the basic facts underlying the event being adjudicated before such a tribunal have been determined.

This Court should review the Eighth Circuit's ruling in this case because of its anomalous departure from well-accepted precepts of legal reasoning and decision making in the field of former adjudication. Petitioner asks for the supervisory review of this Court to correct the error of the Eighth Circuit (i) in failing to give effect to respondents' stipulation on the record that the issues raised before the District Court and the issues adjudicated before the State Commission are the same, and (ii) in holding that Arkansas law requires that a diversity tort action for damages must go forward in federal court if the state administrative

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> The issue here is whether the operation of [petitioner's] unit is causing damage or has caused damage to offset operators.

Note: Petitioner believes that there is no real dispute between the parties that the factual issues that respondents now seek to litigate before a jury in the federal district court are identical to the factual issues already adjudicated by the State Commission and affirmed on appeal in state court.

[14]See discussion of findings of the State Commission and the state court on this issue in footnotes 5 and 10, *supra*.

agency before whom the action previously was tried had no authority to award compensatory damages. Such supervisory review is authorized by Rule 17.1(a) of the Rules of this Court.

II.

Because of the federal judiciary's burgeoning dockets, the court below erred in failing to apply federal principles of issue preclusion in order to avoid unnecessary relitigation in the federal courts of the same factual issues previously determined in a state administrative adjudication.

The courts below purported to follow the collateral estoppel or issue preclusion principles of the forum state, presumably feeling that under the doctrine of *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938), they were bound to do so. *See generally,* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4472 (1981). Requiring federal courts to follow state law principles of collateral estoppel slavishly in diversity actions, however, ignores the overriding interests the federal courts have in controlling their dockets and in increasing the judicial efficiency of the national courts. This case presents this Court with an opportunity to evaluate and protect these overriding federal interests. This Court should grant review in this case in order to adopt a federal rule for determining what issues have been necessarily and preclusively decided by state tribunals for purposes of avoiding relitigation in the federal courts in cases governed by state substantive law. This federal principle would preclude litigants who have received a full and fair hearing before a state adjudicatory body from re-trying the same factual issues in federal court, whether or not they would have a right to relitigate those issues in a state proceeding.

The Eighth Circuit majority panel relied upon its understanding of Arkansas law in concluding that the State Commission's lack of authority to award compensatory damages precluded that body's factfindings from having collateral estoppel effect in respondents' tort action. Assuming, *arguendo,* that the majority's understanding of Arkansas law is correct,[15] litigants in Arkansas state courts now are free to re-try factual issues determined previously by Arkansas administrative agencies whenever those agencies are powerless to award money damages. If the Arkansas courts are willing to dissipate their energies on such senseless endeavors, which petitioner believes they are not, that is their prerogative. But surely a federal court should not be bound by such folly. Federal interests in the efficient operation of the federal courts, the effective utilization of the federal judiciary's limited resources, and the equal administration of the principles of finality in the federal courts surely must override Arkansas' assumed penchant for giving litigants two bites at the apple. These federal interests mandate adoption of federal principles of issue preclusion in a case such as this so that unnecessary relitigation may be avoided in the federal courts.

This Court has recognized that federal interests — what have been referred to as countervailing considerations — may override the *Erie* doctrine's requirement that federal courts sitting in diversity apply the forum state's law. *Byrd*

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[15]Petitioner suggests that this understanding of Arkansas law is directly contrary to Arkansas precedent, *Bockman v. Arkansas State Medical Board,* 229 Ark. 143, 313 S.W.2d 826 (1958); *National Surety Co. v. Coates,* 83 Ark. 545, 104 S.W. 219 (1907); *Gosnell Special School Dist. No. 6 v. Baggett,* 172 Ark. 681, 290 S.W. 577 (1927); and to a federal case applying Arkansas law, *Sides v. Haynes,* 181 F.Supp. 889 (W.D. Ark. 1960). Petitioner notes that the same argument that was accepted by the Eighth Circuit was rejected by this Court, applying federal law, in *Utah Construction,* 384 U.S. at 418-419.

v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958); *see also* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4472, p. 729. In *Byrd*, a diversity case involving South Carolina law, this Court concluded, contrary to South Carolina precedent, that the jury and not the federal district court should sit as the fact-finder. After noting that the federal system has allocated the factfinding function to the jury, this Court reasoned that compliance with the South Carolina precedent would so alter the character of the federal court that countervailing federal interests precluded the application of forum state law.

This Court has recognized that strong federal interests in judicial efficiency and finality are promoted by a liberal application of issue and claim preclusion. *See Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979) (approving of the offensive use of collateral estoppel in the federal courts); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (abolishing requirement of mutuality in federal question cases). *See also* Restatement (Second) of Judgments § 86, comment g (1982) (suggesting that although a federal court usually must give exactly the same faith and credit to a state judgment as would the courts of the rendering state, there may be federal concerns and interests that justify giving that judgment greater preclusive effect in federal court than it would receive in state court). Even assuming the Eighth Circuit's understanding of Arkansas law is correct, these same federal interests — as compelling as those in *Byrd* — run counter to and override the need to follow Arkansas law. This Court should grant this petition and determine whether federal principles of issue preclusion should be adopted, at least for purposes of defining the nature of issues that cannot be relitigated in federal court.

The desirability of adopting federal principles of issue preclusion in diversity cases is great – particularly with regard to the situation in the instant case. Assuming that the Eighth Circuit's interpretation of Arkansas law is correct, slavish following of that law requires a federal court sitting in a diversity case to permit the relitigation of an issue that has been fully and fairly litigated before a competent state administrative agency – a tribunal with special competence over such issues – *only* because the losing party before the agency is now asking for a different remedy.

Allowing the decision below to stand would encourage unsuccessful litigants before state agencies to invoke diversity jurisdiction and burden the federal courts with repetitive and unnecessary relitigation, thereby distracting our national courts from matters of nationwide concern. This Court should grant review in this case to shut the door to those who would consume our limited federal judicial resources on such wasteful endeavors.

CONCLUSION

For these reasons, petitioner prays that this petition for certiorari be granted.

Respectfully submitted,

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November 21, 1986

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 85-1033

Sam Richardson, Jr., J.S. Beebe, J.S. Beebe, Jr., Joe R. May, Berg, Laney and Brown, *Appellants,* and Jack Washington.	)	Appeal from the United States District Court for the Western District of Arkansas.
v	)	
Phillips Petroleum Company, *Appellee.*	)	

Submitted: October 18, 1985
Filed: May 23, 1986

Before LAY, Chief Judge, ARNOLD and FAGG, Circuit Judges.

LAY, Chief Judge.

Six independent oil and gas contractors appeal from the district court's order dismissing with prejudice their amended complaint. The district court found that the facts and issues as determined in prior proceedings before the Arkansas Oil and Gas Commission barred litigation of the facts and issues raised in the complaint. We reverse, and remand to the district court for a plenary trial.

Background

Sam Richardson and five other individuals ("the Richardson group") hold oil leases and operate wells on a tract of land in Union Country, Arkansas which is adja-

cent to a tract on which Phillips Petroleum Company ("Phillips") holds oil leases and operates wells. In 1970, Phillips was authorized by the Arkansas Oil and Gas Commission ("the Commission") to establish and operate the Smackover Nacatoch Sand 985 Acre Unit ("the Smackover Unit") with the express purpose of implementing an experimental secondary recovery steam, air, and water injection process. The Commission's 1970 unit authorization was conditioned on Phillips' operations being conducted in such a manner as not to endanger the production of nearby operations. However, contending that Phillips' Smackover Unit injections migrated from that unit and damaged the productivity of the Richardson group's adjacent wells, the Richardson group twice instituted adjudicatory proceedings before the Commission challenging Phillips' operation and seeking injunctive relief. In 1976, some members of the Richardson group joined in an application for an order from the Commission requiring that Phillips discontinue its air injections on the Smackover Unit. After a full administrative hearing, their request that Phillips' 1970 authorization be revoked was denied without prejudice to the filing of a new application upon the production of new evidence. The Commission concluded, in pertinent part:

> 1. That the applicants have failed to prove that they have experienced increasing and irreparable damage to their offset wells producing from the Nacatoch Sand as a result of the operations of Phillips Petroleum Company in operating its 985 acre Smackover Nacatoch Sand Unit and * * *
>
> 2. That the applicants have failed to prove that unit operations of the Smackover Nacatoch Sand 985 acre unit is in violation of any of the

> Orders of the Arkansas Oil and Gas Commission and to the contrary, Phillips Petroleum Company has proven that its operation of its Smackover Nacatoch Sand 985 acre unit is not in violation of any of its Orders.

The Commission's 1976 order was not appealed. In 1979, the entire Richardson group now before this court filed another application with the Commission, which was treated by the Commission as a request to amend the 1970 order to set forth additional protections for nearby operators and to suspend, if necessary, its authorization of Phillips' Smackover Unit operation until the unit's operations conformed to that amended order. After a full hearing, the Commission found in pertinent part:

> 7. That the total evidence presented at said hearing is insufficient to establish that the production of such off-set or nearby operators has been endangered or otherwise damaged as the consequence of the conduct of the operations in carrying out the development of the unitization.
>
> 8. That the application as filed and which is the subject matter hereof should be denied; provided, however, that the staff of the Commission should be directed to investigate and determine a testing procedure * * * for purposes of monitoring the movement of fluid and/or gas materials within the Nacatoch Formation.

The Richardson group sought review of the Commission's 1979 denial of its application in Arkansas state district court. In December 1982, the state court issued an order affirming the Commission's findings. In that order, the state court stated that "[the Richardson group's] rights to proceed against [Phillips] for any perceived damages to their property rights are not affected by the action of the

Commission." Neither party appealed the state court's order.

In January 1981 the Richardson group filed a civil tort action for trespass, nuisance, and negligence in Arkansas state court, seeking compensatory and punitive damages from Phillips for alleged damage to their property's productivity due to Phillips' secondary recovery operation. On Phillips' motion, the suit was removed to federal district court. Phillips then moved the district court for dismissal of the action on collateral estoppel grounds, arguing that the Commission's prior administrative findings barred litigation of the facts and issues raised in the Richardson group's tort action. The district court[1] denied Phillips' motion to dismiss, finding that the Richardson group's tort action sought money damages, which the Commission is not authorized to grant. The district court's denial was also based on its finding that the issue before the Commission was whether its prior order authorizing Phillips' secondary recovery operation should be modified or revoked, a question different from the breach of duty issues pleaded in the Richardson group's tort complaint.

Phillips next moved for summary judgment, partial summary judgment, and a declaration that the findings made by the Commission in its prior proceedings are established and binding between the parties in the tort action by virtue of collateral estoppel. In December 1984, the district court, with a different judge presiding,[2] denied Phillips' motion for summary judgment, reaffirming the prior district court finding that the Richardson group was

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[1]The Honorable Oren Harris, Senior United States District Judge for the Eastern and Western Districts of Arkansas, presiding.

[2]The Honorable William R. Overton, United States District Judge for the Western District of Arkansas, presiding.

not barred from bringing its action for money damages on res judicata grounds. However, finding "that the Commission acted in a judicial, or quasi-judicial, capacity when it conducted the prior hearings and rendered its findings of fact and conclusions of law", the district court did grant partial summary judgment on behalf of Phillips. The district court stated that even if the Commission's 1979 order did not in itself preclude litigation of the facts and issues raised in the complaint, the state court's December 1982 order affirming the Commission's 1979 order would have collateral estoppel effect. The district court concluded:

> Even though the prior adjudications before the Oil and Gas Commission did not involve a claim for damages, at least the findings of fact and issues necessarily decided must be given collateral estoppel effect in the instant lawsuit.
>
> * * *
>
> Plaintiffs are directed to file an amended complaint within 20 days of the entry of this order alleging with specificity any issues which are not barred by the preclusive effect of the collateral estoppel ruling in this order.

In amending its pleadings as directed by the district court, the Richardson group stated that it was "unable to allege with specificity any issues which are not barred by the preclusive effect of the collateral estoppel ruling in the Court's Order." The district court dismissed the amended complaint. This appeal followed.

Analysis

The issue on appeal is whether the Richardson group's state tort action is barred because the essential facts to be

litigated in that action were necessarily decided by the Commission so that the Commission's findings, affirmed by the state court, should be given collateral estoppel effect.

Collateral estoppel is an issue of substantive law requiring the application of state law in diversity actions. *Kuehn v. Garcia,* 608 F.2d 1143, 1147 (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980). Arkansas courts have applied collateral estopped in the context of certain state administrative adjudications to preclude the litigation of identical fact issues in a subsequent judicial proceeding. Following the Supreme Court's statement in *United States v. Utah Construction and Mining Co.,* 384 U.S. 394 (1966), the Arkansas Supreme Court has recognized that:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Rainbolt v. Everett, 639 S.W.2d 532, 534 (Ark. Ct. App. 1982) (quoting *Utah Construction*, 384 U.S. at 422).

Arkansas law instructs that Phillips, as the party seeking to invoke collateral estoppel or "issue preclusion," a doctrine related to but distinct from questions involving claim extinguishment, *see, e.g., Smith v. Roane,* 284 Ark. 568, 683 S.W.2d 935, 936 (Ark. 1985), has the burden to demonstrate that the precise issue on which it claims that the court and other parties are bound and which is precluded from being litigated was decided in the previous proceeding. *Smith,* 683 S.W.2d at 936 (citing *JeToCo Corp. v. Hailey Sales Co.,* 268 Ark. 340, 596 S.W.2d 703, 706 (Ark. 1980)). In *JeToCo,* the Arkansas Supreme Court explained that "the true test of whether a particular

point, question or right has been concluded by a former suit and judgment is whether such point, question or right was distinctly put in issue, or should have been put in issue, and was directly determined by such former suit and judgment." *JeToCo*, 596 S.W.2d at 706. After reviewing the record and applicable Arkansas law, we find that the district court erred in failing to conclude that there is not a sufficient identity of issues between those distinctly litigated and necessarily decided in the Commission hearings and the issues raised in the state law proceedings to allow application of the collateral estoppel doctrine here.

In conducting our review, we deem it relevant to examine the scope of authority granted to the Commission by the Arkansas legislature. It is well recognized that when a legislature's scheme of remedies demonstrates that the proceedings in an administrative tribunal are determinative only for purposes of the controversy immediately before the agency, the rule governing issue preclusion does not apply. *See* Restatement (Second) of Judgments § 83, comment h (1982) (incorporating Restatement (Second) of Judgments §§ 27 and 28). Although the Commission is plainly not a court, it was created by the Arkansas legislature and endowed by that body with quasi-judicial functions. *See Rainbolt*, 639 S.W.2d at 534 (finding res judicata principles may apply to quasi-judicial proceedings before the Arkansas Employment Security Division, Board of Review). The policies underlying the establishment of Arkansas' Oil and Gas Commission are to protect public and private interests against recognized evils occurring in the production and use of oil and gas, to compel ratable production, and to prohibit waste. Ark. Stat. Ann. § 53-101 (1971). As a state administrative agency with a statutory mandate to conserve Arkansas' natural resources, the measures enumerated in the Commission's

enabling act are the exclusive means by which the Commission can attain that goal. *See Dobson v. Arkansas Oil and Gas Commission,* 218 Ark. 160, 235 S.W.2d 33, 36 (Ark. 1950). The Commission's powers include the authority to make, after hearing and notice, "such reasonable rules, regulations and orders as may be necessary from time to time in the proper administration and enforcement of this act" and lists a variety of regulatory, administrative, and enforcement functions delegated to the Commission. Ark. Stat. Ann. § 53-111 (Supp. 1985). By its terms, however, the statute does not contemplate that the Commission can adjudicate and award money damages.

It is plain that a prior tribunal's findings should not be given preclusive effect if the issues determined in the first case are not the same as those to be determined in the second. *See Smith,* 683 S.W.2d at 936. In evaluating whether the issues adjudicated in an administrative hearing are substantially different from those raised in a subsequent court action, the weight given the facts in each proceeding and the applicable proof burdens are highly relevant. *See* 4 K. Davis, Administrative Law Treatise § 21.5 (2d ed. 1983); *cf. Smith,* 683 S.W.2d at 936-37 (no collateral estoppel effect because first tribunal's finding of intent to protect oneself from injury for self-defense purposes different from intent or expectation of injury caused by one's act). Moreover, in order to determine what has been adjudicated, resort may be made to the record developed in the prior case's proceedings. *See JeToCo,* 596 S.W.2d at 707.

The Commission's November 1979 deliberations, on which the order sought to be given collateral estoppel effect here was based, reveal that the Commission members were well aware of the statutory constraints to their review

of the facts and fashioning of a remedy. When one of the Commission members asked at the very beginning of the deliberations what the Commission's alternatives were, the hearing officer explained:

> I think that the Commission can either find that on the one extreme [the 1970 order] and the conditions imposed upon Phillips with respect to [the Smackover Unit] under the terms of that order have been fully performed and that the application should be denied; to the other extreme that you find a violation of that order to be to the extent that you would have the authority to set aside the unit.
>
> Now within the middle ground necessarily there would be the area that has been touched upon during the course of the presentation of the imposition of further reporting requirements either by Phillips or by the applicants.
>
> * * *
>
> I don't think any member of this Commission wants to strike down the unit. I really don't feel that that is what the applicants want done, is to destroy the unit.
>
> But neither does any member of this Commission wish to see any offset lease operator prejudiced or hurt in any way with regard to the unit operations.

The bulk of the Commission's deliberations were devoted to devising a test for determining whether Phillips' injections were in fact migrating to the Richardson group's adjacent wells, with a consensus reached that the Commission would either approve or disapprove the Richardson group's petition *as applied for* with a concurrent order that some method of testing for monitoring migration, if any,

from Phillips' unit would be implemented. The thrust of the hearing testimony, in the Commission's eyes, was whether the 1970 unitization order should "be withdrawn and the unit terminated as the method of proposed operation cannot be conducted whereby it will not adversely affect, [sic] offset and nearby operators."

Moreover, the Richardson group's alternative prayer for payment of damages was recognized by the Commission members as outside the scope of their authority. Several times during the Commission's deliberations after the close of the evidence, the issue of awarding money damages to the Richardson group in lieu of injunctive relief was raised but repeatedly dismissed with an express acknowledgement that the Commission members were not weighing the facts for purposes of determining damages because the Commission did not have the statutory authority to award money damages.

The Commission members thus clearly understood that they were narrowly constrained to assess the evidence for purposes of fashioning injunctive relief. As the hearing officer stated on behalf of the other Commission members, "if [a testing method] is obtainable, [sic] then [we shall] enter an order which I assume would be the request of the applicants since the prayer is for the termination of the unit and no one has indicated that is their disposition." the deliberations also illustrate that the Commission members understood the substantive difference between the level of proof required to completely enjoin Phillips' operation and the entirely different proof burden applicable to resolving a claim for monetary damages in tort. We find it significant that in the Commission's 1976 order denying the Richardson group's first request for injunctive relief, it found that the Richardson group had not proven they had been "irreparably harmed." The Commission's delibera-

tions convicingly demonstrate that a finding that the Richardson group was damaged in some way short of irreparable harm compelling injunctive relief was simply not essential to the findings contained in the Commission's 1979 order. A finding of damage to the Richardson group short of irreparable damage for injunctive purposes was never decided by the Commission.

The Arkansas Supreme Court has previously recognized the incompatibility of legal concepts and proof burdens applicable in an action to enjoin a secondary recovery operation and those appropriate to an action for trespass of a mineral field which seeks an award of compensatory damages to make the allegedly injured party whole. In *Jameson v. Ethyl Corp.*, 271 Ark. 621, 609 S.W.2d 346 (Ark. 1980), the Arkansas Supreme Court held that:

> reasonable and necessary secondary recovery processes of pools of transient materials should be permitted, when such operations are carried out in good faith for the purpose of maximizing recovery from a common pool. The permitting of this good faith recovery process is conditioned, however, by imposing an obligation on the extracting party to compensate the owner of the depleted lands for the minerals extracted in excess of natural depletion, if any, at the time of taking and for any special damages which may have been caused to the depleted property. By this holding we believe that the interests of the owners and the public are properly protected and served.

Jameson, 609 S.W.2d at 351.

We hasten to note that there are likely many instances in which it might be appropriate to find that the Commission's findings have a collateral estoppel effect on the litigation of issues in a related state court action. *See, e.g.*,

Katter v. Arkansas Louisiana Gas Co., 765 F.2d 730, 733 (8th Cir. 1985). We also agree with the district court that in some circumstances administrative determinations which have been upheld on judicial review are entitled to special deference for collateral estoppel purposes. *See Bockman v. Arkansas State Medical Board*, 229 Ark. 143, 313 S.W.2d 826, 829 (Ark. 1958). However, we do not view the Richardson group's tort complaint to be an attempt to relitigate facts and issues already determined. *Cf. Wells v. Arkansas Public Service Commission*, 272 Ark. 481, 616 S.W.2d 718, 719 (Ark. 1981) ("One fair trial on the merits of the case is all [the parties] are entitled to.") The degree of actionable harm to be proved in each proceeding is quite different; the limits to each tribunal's powers to evaluate the alleged harm and to construct an appropriate remedy vary greatly. After reviewing the record and the statutory scope of authority delegated to the Commission, we believe there is more than a de minimus difference between the issues raised and the weight to be given the facts in the two actions. It does not appear from the record that the Commission resolved the factual issue of "damage" to the same extent and in a means clearly necessary for the state court tort action. Our evaluation of the record, review of the administrative proceedings, and study of the applicable law convinces us that the findings of the Commission in its 1979 order denying injunctive relief should not preclude litigation of the fact questions and issues raised in the subsequent state tort action brought by the Richardson group.[3]

---

[3]The Richardson group also argues on appeal that because no appeal was taken by Phillips from the state court's statement in its December, 1982 order, affirming on appeal the Commission's 1979 order, that the Richardson group's right to proceed in tort was not affected by the Commission's actions, that finding by the state court is conclusive as

As applied to the facts before us, it is clear that the collateral estoppel doctrine is no bar to the Richardson group's suit for damages. We reverse the judgment of the district court and remand for plenary trial of the claims stated in the Richardson group's complaint.

FAGG, Circuit Judge, dissenting.

In 1970, the Arkansas Oil and Gas Commission authorized Phillips Petroleum to establish a secondary oil recovery project. As an express condition of that authorization, Phillips was forbidden from operating the recovery project in a manner that would damage or endanger the production of nearby oil fields.

In 1979, the Richardson group (containing the identical parties involved in the present action) instituted proceedings against Phillips before the Oil and Gas Commission. Asserting that the operation of the Phillips' recovery project had endangered and damaged the productivity of their oil wells, the Richardson group sought injunctive relief against Phillips.

In response to the Richardson group's complaint, the Oil and Gas Commission gave public notice of the complaint and conducted a public hearing. At that hearing, both parties werer represented by counsel. Additionally, both parties made opening and closing statements, introduced evidence, and called witnesses who were subject to direct and cross-examination. Central to the entire proceeding before the Commission was the issue of whether the interests of the Richardson group had been damaged sufficiently to warrant injunctive relief against Phillips Petroleum.

---

the law of the case and precludes the application of collateral estoppel here. Because we find for the Richardson group on collateral estoppel grounds, we need not address the law of the case issues raised here.

After considering all evidence presented, the Oil and Gas Commission denied the relief requested by the Richardson group. In reaching that result, the Commission expressly found the Richardson group had failed to establish that its oil interests had been damaged by Phillips Petroleum. In fact, the Commission found that the Richardson group had even failed to show that its oil interests had been endangered by the conduct of Phillips Petroleum.

As was its right under Arkansas law, the Richardson group sought judicial review of the Oil and Gas Commission's decision in Arkansas state court. However, before receiving any determination by that court, the Richardson group instituted the present action in January of 1981.

In December of 1982, the Arkansas state court affirmed the action taken by the Commission. Significantly, in its decision affirming the Commission's ruling, the state court recognized the Commission's express finding that the interests of the Richardson gorup had not been damaged by Phillips Petroleum. The state court found further than this finding was supported by substantial evidence.

Obviously, Phillips Petroleum, in whose favor judgment was entered, did not appeal the decision of the Arkansas state court. The Richardson group, although having incentive to do so, also failed to appeal the state court's decision.

In August of 1984, Phillips Petroleum, on the basis of the 1979 Oil and Gas Commission ruling as affirmed by the Arkansas state court, filed a motion for summary judgment. That motion was based on theories of claim preclusion (res judicata) and issue preclusion (collateral estoppel). The district court properly recognized (as had

the state court) that the Richardson group's right to bring a damage claim was not affected by the Commission's refusal to award injunctive relief. Thus, the district court found that the Richardson group's damage claim was not barred by claim preclusion.

However, the district court also recognized that the Commission's denial of the Richardson group's injunctive claim was based in part on an express finding that the Richardson group had not been damaged by the actions of Phillips Petroleum. Without question, the issue of damages was at the very heart of the proceedings before the Commission. Given the adjudicatory nature of the prior administrative proceedings, at which the Richardson group had the opportunity to litigate fully the damage issue, and given further that the Commission's express finding of no damage had been specifically affirmed on judicial review, the district court held that under Arkansas law the Richardson group was collaterally estopped from relitigating in the present action the same damage issue already adjudicated.

The district court then gave the Richardson group the opportunity to assert issues not barred by its ruling. In response, the Richardson group did not assert that the damage issue in the present case was somehow distinguishable from the damage issue adjudicated in the prior administrative proceeding (*i.e.* involving a different burden of proof or different evidence). The Richardson group also failed to assert that actions of Phillips Petroleum occurring after the Commission's ruling created some new and distinct claim for damages. Rather, the Richardson group admitted that no issue existed beyond that barred by the district court's ruling. By so doing, the Richardson group effectively conceded that the damage issue expressly

resolved by the Oil and Gas Commission was identical to the damage issue presented in its federal action.

Under Arkansas law, collateral estoppel will bar the relitigation of an issue if the party asserting its applicability demonstrates that the issue in question was distinctly raised and directly determined in an earlier adjudicatory proceeding. *JeToCo Corp. v. Hailey Sales Co.*, 596 S.W. 2d 703, 706 (Ark. 1980); *see also Smith v. Raone,* 683 S.W.2d 935, 936 (Ark. 1985). That doctrine is equally applicable when the prior proceeding involved an administrative body acting in its quasi-judicial function. *Rainbolt v. Everett,* 639 S.W.2d 532, 534 (Ark. App. 1982) (citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966)). Such deference to an administrative body is particularly warranted when an issue expressly decided by the administrative body has been specifically upheld on judicial review. *See Bockman v. Arkansas State Medical Board,* 313 S.W.2d 826, 829 (Ark. 1958).

Here, the record clearly demonstrates that the Richardson group in the proceeding before the Oil and Gas Commission raised and fully litigated the issue of damages. Further, during that proceeding the group had the incentive and the opportunity to present evidence of any and all damage to its oil interests.

After considering the evidence presented at the adjudicatory hearing, the Commission denied injunctive relief to the Richardson group. That denial, however, was not based on a finding that while damaged the Richardson group's interests were not so irreparably harmed as to warrant injunctive relief. Rather, the Commission's denial was based on the specific finding that the Richardson group had not been damaged or even endangered by the Phillips' operation. The Commission's express finding of no damage was affirmed by an Arkansas state court.

I agree with the district court that these determinations are binding on the Richardson group. The Oil and Gas Commission's finding of no damage not only supports and was central to its decision but also fatally undermines the Richardson group's identical assertion of damage in the present action. Because the Richardson group has received and has taken advantage of a full and fair opportunity to litigate the damage issue, I conclude the district court's dismissal of the Richardson group's complaint on the basis of collateral estoppel should be affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-1033

Sam Richardson, Jr., J.S. Beebe, J.S. Beebe, Jr., Joe R. May, Berg, Laney and Brown,	*	
Appellants,	*	
and Jack Washington.	*	Appeal from the United States District Court for the Western District of Arkansas.
v.	*	
Phillips Petroleum Company,	*	
Appellee.	*	

Filed: August 25, 1986

ORDER

The petition for rehearing en banc is denied for lack of a vote to rehear by a majority of the active circuit judges. *See* Fed. R. App. P. 35(a). Judges ROSS, FAGG, BOWMAN AND MAGILL would grant the rehearing en banc. The petition for rehearing by the panel is also denied.

In denying the petition, we note that in *University of Tennessee v. Elliott,* 106 S.Ct. 3220 (1986), the Supreme Court recently held that quasi-judicial administrative adjudications can have a preclusive effect on further court proceedings on the same issue. Arkansas law has long adhered to the collateral estoppel principles articulated in

United States v. Uah Construction and Mining Co., 384 U.S. 394 (1966), which were reiterated in *Elliott*, that preclusive effect may be accorded findings of a state agency when it acts in a judicial capacity to resolve disputed fact issues properly before it which the parties have had an opportunity to litigate. *See Elliott*, 106 S.Ct. at 3226; *Rainbolt v. Everett*, 639 S.W.2d 532, 534 (Ark. Ct. App. 1982) (both quoting *Utah Construction* 384 U.S. at 422). Here, as both the administrative tribunal and the state court on review recognized, the issue before the Arkansas Oil and Gas Commission was whether a petroleum company's operations should be completely shut down. The relief sought from the Commission was for an injunction based upon a showing of irreparable harm from the company's acts. The Commission specifically referred to its inability to pass on compensatory damges and the state court acknowledged that its judgment on review upholding the Commission's denial of injunctive relief should not preclude a state court tort action. Notwithstanding the legal precepts found controlling in *Elliott*, which our majority opinion also quotes and with which we agree, where the issue tried before the administrative tribunal was not the same as the issue to be determined in the subsequent lawsuit, these rules of issue preclusion do not bar further proceedings here.

Judge Fagg, reaffirming his dissent, argues that *Elliott* reinforces his contention that collateral estoppel should apply here to bar a subsequent tort action. Clearly, however, *Elliott* establishes no new rule which should alter our present opinion. *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), still requires this court to look to state law, and we must give the Commission's fact finding the same preclusive effect to which it would be entitled in the state's courts. Our reading of

Arkansas state law convinces us that the issue preclusion rules stated in *Utah Construction* should not be applied to bar a state court action for damages here. For these reasons, the petition for rehearing is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

SAM RICHARDSON, JR.,
J.S. BEEBE,
J.S. BEEBE, JR.,
JOE R. MAY and
BERG, LANEY AND BROWN — PLAINTIFFS

Vs. NO. 81-1008

PHILLIPS PETROLEUM COMPANY — DEFENDANT

ORDER

The plaintiffs having amended their complaint so as to state that they are unable to allege with specificity any issues which are not barred by the preclusive effect of the collateral estoppel ruling in this Court's Order of December 6, 1984, the complaint of the plaintiffs is hereby dismissed with prejudice on the grounds that the findings of fact and issues determined by the Arkansas Oil and Gas Commission in the prior proceeding are established and binding between the parties in this lawsuit by virtue of collateral estoppel.

DATED this 13th day of December, 1984.

/s/ William R. Overton
United States District Judge

APPROVED AS TO FORM:

Compton, Prewett, Thomas & Hickey, P.A.

By: /s/ Robert C. Compton
Robert C. Compton
Attorneys for Plaintiffs

Friday, Eldredge & Clark

By: /s/ Robert K. Walsh
Robert K. Walsh
Attorneys for Defendant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

SAM RICHARDSON, JR.,
J.S. BEEBE,
J.S. BEEBE, JR.,
JOE R. MAY and
BERG, LANEY AND BROWN — PLAINTIFFS

Vs. NO. 81-1008

PHILLIPS PETROLEUM COMPANY — DEFENDANT

AMENDED COMPLAINT

Plaintiffs are unable to allege with specificity any issues which are not barred by the preclusive effect of the collateral estoppel ruling in the Court's Order of December 6, 1984.

COMPTON, PREWETT, THOMAS & HICKEY, P.A.
423 North Washington Avenue
El Dorado, Arkansas 71730
Telephone: (501) 862-3478

By: /s/ Robert C. Compton
Robert C. Compton
Attorneys for Plaintiffs

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

SAM RICHARDSON, JR.; J.S. BEEBE;
J.S. BEEBE, JR.; JOE R. MAY;
BERG, LANEY AND BROWN; AND
JACK WASHINGTON — PLAINTIFFS

VS. — NO. 81-1008

PHILLIPS PETROLEUM COMPANY — DEFENDANT

ORDER

Before the court are defendant's motion for summary judgment, partial summary judgment, and to declare certain facts established by collateral estoppel.

Plaintiffs brought this action alleging that the defendant has operated Smackover Nacatoch Sand 985 Area Unit (the Unit) in a negligent manner. Specifically, it is alleged that defendant, in an attempt to increase production, initiated an experimental stream injection project at the Unit. Plaintiff contends that the stream migrated onto other properties and adversely affected the oil producing capabilities of properties owned by the plaintiffs. The properties owned by the plaintiffs are not part of the Unit. Phillips, according to the plaintiffs, has willfully continued to operate the Unit in a negligent manner, without protective measures for other operators and has endangered and damaged plaintiffs, offset operators, nearby operators, royalty owners and other mineral owners. Plaintiffs allege that defendant has trespassed on their properties and that its operations constitute a private nusiance. Compensatory and punitive damages are sought.

Defendant has moved for summary judgment, partial summary judgment, and seeks to declare certain facts established by collateral estoppel.

In support of its motion, defendant states that plaintiffs have twice brought adjudicatory proceedings before the Arkansas Oil and Gas Commission challenging the same operations of Phillips' unitized secondary recovery project as are the subject of this lawsuit. Specifically, it is contended that in 1976 three of the plaintffs herein were parties to a proceeding and hearing before the Arkansas Oil and Gas Commission (the Commission) in which the Commission denied plaintiffs' contentions and requested relief. It is also stated that in 1979 each of the plaintiffs in the instant suit brought an adjudicatory proceeding before the Commission alleging that their operations had been adversely affected and their expenses increased by the operations on the Phillips Unit. In that proceeding, plaintiffs requested a modification, or enforcement, of the unitization order. At the conclusion of the hearing, the Commission denied plaintiffs' application. The plaintiffs filed a petition for review of the 1979 Commission order in the Circuit Court of Union County. On December 27, 1982, the Circuit Court issued an order which affirmed the 1979 Commission order and dismissed plaintiffs' petition for review.

Defendant attached copies of the Commission's orders and the order of the Circuit Court of Union County. Based upon the alleged res judicata effect of these prior orders, defendant states that all of the plaintiffs' claims are barred by res judicata and that defendant is entitled to summary judgment.

Judge Oren Harris, in an order dated March 23, 1983, denied the defendant's motion for summary judgment bas-

ed on the res judicata effect of the prior proceedings and orders. Judge Harris found that plaintiffs were not barred from bringing this action seeking damges for alleged trespass and nuisance as the Commission was not empowered to award damges and the issue before the Commission was whether a modification or enforcement of the unitization order should be issued. This court agrees with the order previously entered and the ruling with respect to res judicata remains unchanged. The motion for summary judgment is denied.

Defendant also moves for partial summary judgment and to have the court declare that the findings of fact and issues determined by the Arkansas Oil and Gas Commission in the prior proceedings are established and binding between the parties in this lawsuit by virtue of collateral estoppel.

The Arkansas Oil and Gas Commission, on March 15, 1976, issued Order, Reference No. 9-76, in which it made the following findings of fact and conclusions of law.

> That volumes of air injected by the operator, Phillips Petroleum Company, are substantially equal to the volumes of air actually produced from the wells within the 985 acre unit and there is no substantial encroachment of the air injected by the operator on the offsetting or nearby wells. That the Nacotoch Sand has operated on a vacuum since early 1930's and that huge amounts of air have penetrated the formation and reservoir and that air injection by the operators of the unit does not substantially alter the present day condition of the reservoir.
>
> That the applicants have failed to prove that they have experienced increasing and irreparable damage to their offset wells producing from the

> Nacatoch Sand as a result of the operations of Phillips Petroleum Company in operating its 985 Smackover Nacatoch Sand Unit and to the contrary, the operator, Phillips Petroleum Company, has proven that any difficulties and operational problems experienced by the offsetting or nearby operators from the Nacatoch Sand have not been caused by the injection of air into its 985 acre unit or any other portion of its operation of said unit. That the applicants have failed to prove that unit operations of the Smackover Nacatoch Sand 985 acre unit is in violation of any of the orders of the Arkansas Oil and Gas Commission and to the contrary Phillips Petroleum Company has proven that its operation of its Smackover Nacatoch Sand 985 acre unit is not in violation of any of its Orders.

The Arkansas Oil and Gas Commission also issued an order in 1979, Reference No. 117-79, in which the Commission made the following findings of fact and conclusions of law:

> That the total evidence presented at said hearing is insufficient to establish that the production of such offset or nearby operators has been endangered or otherwise damged as the consequence of the conduct of the operations in carrying out the development of the unitization. That applications herein did file their application alleging that the unit operations had been conducted in a manner to endanger the production of off-set or nearby operators so as to thereby invoke the jurisdiction of this Commission which had otherwise been specifically retained. That the total evidence presented at said hearing is insufficient to establish that the production of such off-set or nearby operators has been endangered or other-

> wise damaged as the consequence of the conduct of the operations in carrying out the development of the unitization.

The Circuit Court of Union County denied the petition for review and stated:

> There is an express finding of the Commission that the unit operations have not damaged the correlative rights of petitioners. This Court cannot make its own evaluation of the evidence and arrive at its own conclusions.

The general law of collateral estoppel is summarized in the Restatement of Judgements 2d, §27, as follows:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, *whether on the same or a different claim.* (Emphasis added).

See also, *Sides v. Haynes,* 181 F.Supp. 889 (W.D. Ark. 1960). The decision of an administrative tribunal acting in a judicial, or quasi-judicial, capacity should have the finality afforded by the doctrine of res judicata. *Rainbolt v. Everett,* 6 Ark. App. 204, 639 S.W.2d 532 (1982); *Bockman v. Arkansas State Medical Board,* 229 Ark. 143, 313 S.W.2d 826 (1958). The court finds that the Commission was acting in a judicial, or quasi-judicial, capacity when it conducted the prior hearings and rendered its findings of fact and conclusions of law. The order of the Commission, Reference No. 117-79, recites the procedure of the hearing. The Commission met after due notice and conducted a public hearing in which both parties were represented by counsel. The parties made opening statements, called witnesses to testify, cross-examined witnesses, in-

troduced evidence into the record, and made closing statements. The Commission's findings of fact and conclusions of law should be given collateral estoppel effect in this proceeding. Even if the Commission's order would not alone be entitled to preclusive effect, the order of the Circuit Court of Union County would. In *Bockman v. Arkansas State Medical Board,* 229 Ark. 143, 313 S.W.2d 826 (1958), the Arkansas Supreme Court stated:

> When an administrative tribunal acts judicially or quasi-judicially, there are good reasons for holding that the decisions should have the finality that is conferred by the rule of res judicata. *Especially is this true when, as here, the administrative decision has been upheld upon judicial review.* (Emphasis added.)

Even though the prior adjudications before the Oil and Gas Commission did not involve a claim for damages, at least the findings of fact and issues necessarily decided must be given collateral estoppel effect in the instant lawsuit.

Defendant Phillips also raises the statute of limitations as a bar to this action. The applicable statute of limitations is three years after the cause of action has accrued for claims of trespass, negligence, or nuisance. *Ark. Stat. Ann.* §37-206. In plaintiffs' complaint, it is alleged that the operations on the Phillips unit project have caused them "permanent" damage to their property. See plaintiffs' complaint, Paragraphs 16(iii) and 19.

Under Arkansas law, the statute of limitations on permanent injuries to property interest, such as alleged in this complaint, runs from the time that plaintiffs state that the injury became permanent. *Sunray DX Oil Co. v. Thurman,* 238 Ark. 789, 384 - S.W.2d 482 (1964); *City of*

Springdale v. Weathers, 241 Ark. 772, 410 S.W.2d 754 (1967). There exists a question of fact as to when the injury occurred and when the cause of action accrued. Furthermore, if the damages complained of were of a continuing nature, plaintiffs could recover under Arkansas law for damages during the three year period next preceding filing of their complaint. *Moore v. City of Blytheville,* 1 Ark. App. 35, 612 S.W.2d 327 (1981); *Consolidated Chemical Industries, Inc. v. White,* 227 Ark. 177, 297 S.W.2d 101 (1957). The motion for summary judgment on the basis of the statute of limitations is denied.

Plaintiffs are directed to file an amended complaint within 20 days of the entry of this order alleging with specificity any issues which are not barred by the preclusive effect of the collateral estoppel ruling in this order. Plaintiffs are also directed to allege any claims for damages which are consistent with the court's decision and holding on the statute of limitations issue.

Dated this December 6, 1984.

/s/ William R. Overton
United States District Judge

APPENDIX F

IN THE CIRCUIT COURT OF UNION COUNTY, ARKANSAS
SECOND DIVISION

SAM RICHARDSON, JR., ET AL		PLAINTIFFS
VS.	NO. CIV-79-399	
ARKANSAS OIL & GAS COMMISSION		DEFENDANT
PHILLIPS PETROLEUM COMPANY		INTERVENOR

ORDER AND JUDGMENT

This cause is submitted by the parties with the record of proceedings and orders of the Arkansas Oil and Gas Commission, the pleadings and hearings herein, and excellent briefs of counsel for each of the parties.

After careful consideration, the Court finds that the decision of the Commission in its Order Reference No. 117-79 is supported by substantial evidence, the action is not arbitrary, capricious, or an abuse of discretion.

The Comission acted within its statutory authority after affording a substantial opportunity for hearing. The decision does not violate any rights of petitioners under the state or federal Constitutions.

Petitioners rights to proceed against the operator for any perceived damages to their property rights are not affected by the action of the Commission. The Commission expressly permitted such self-help as the petitioners might care to undertake, such as drilling additional wells. There is an express finding of the Commission that the unit operations have not damaged the correlative rights of petitioners. This Court cannot make its own evaluation of the evidence and arrive at its own conclusions.

The Commission is charged with the responsibility of promoting the greatest possible total recovery of oil and gas by whatever methods are found by it to be appropriate. It is also charged with the protection of the correlative rights of all owners of minerals within the common source of supply. However laudable an experiment, the Commission must protect these correlative rights by requiring safeguards or, if satisfactory safeguards cannot be devised, by denying its sanction to a plan which would adversely affect the rights of other owners in the pool.

There is substantial evidence to support the finding of the Commission, on conflicting evidence, that the unit operations herein do not adversely affect other common owners. This Court cannot make further inquiry.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the Order and action of the Arkansas Oil and Gas Commission appealed from herein be and the same is hereby affirmed and that the petition for review filed herein be and the same is hereby DISMISSED.

DATED: *December 27, 1982.*

/s/ D. Gillaspie
Don Gillaspie, Circuit Judge

APPENDIX G

ARKANSAS OIL AND GAS COMMISSION
314 East Oak Street
El Dorado, Arkansas 71730

REFERENCE NO. 117-79 October 25, 1979

SMACKOVER FIELD

Nacatoch Formation

RE: APPLICATION FOR THE WITHDRAWAL OF ORDER REFERENCE NO. 49-70 AND THE TERMINATION OF THE 985 ACRE UNIT AS CREATED THEREUNDER FOR THE PRODUCTION OF OIL AND/OR GAS FROM THE NACATOCH FORMATION

After due notice, a public hearing was held in El Dorado, Arkansas commencing on October 25, 1979 in the matter of the application referred to above as filed by Sam M. Richardson, Jr., et al. Upon the conclusion of proceedings therein on October 26, 1979, the parties thereto acting by and through their respective counsel of record agreed to the adjournment thereof until the public hearing which was thereafter likewise held upon due notice at Hot Springs, Arkansas, on November 28, 1979, following which the Arkansas Oil and Gas Commission ordered that the application as filed be denied and directed that an inquiry be made to determine test procedures which were available for purposes of monitoring the movement of fluid and/or gas materials within the Nacatoch Formation underlying the SNS-985 Unit, the subject matter of said hearing as presently operated by Phillips Petroleum Company, respondent herein.

DEFINITIONS:

1. The SNS-985 Unit as referred to herein has reference to the unit area designated within the Unit Operating Agreement and Unit Agreement annexed to the Petition as filed in Order Reference No. 49-70 as entered under date of September 16, 1970 and covers those lands as in said Order specifically described.

STATEMENT OF THE CASE:

By Order Reference No. 49-70 entered following a specific hearing held upon due notice as required by law, the Arkansas Oil and Gas Commission did approve a Unit Operating Agreement and Unit Agreement and ordered that from and after the effective date thereof the 985 acre tract as therein particularly described and the rights of all parties therein or pertaining thereto would be unitized for the production of oil and/or gas from the Nacatoch Formation. Under the terms of said Order, Phillips Petroleum Company was designated as the Operator of said unit area and said Order specified that operations in carrying out the development of the unitization shall be conducted in such manner as not to endanger the production of off-set operators, or nearby operators, and it was further ordered that said docket would be kept open to consider any claims of discrimination or hardship and to afford administrative relief, if possible, and to hear any pertinent evidence concerning such matter. Subsequently, a further application was filed seeking the revocation of said Order Reference No. 49-70 on the alleged ground that the operation of said unitized area was adversely effecting operations conducted by off-set and nearby operators. Following a public hearing thereon, such application was denied by Order Reference No. 9-76 upon a finding by the Commission that the evidence introduced in support thereof was insufficient

to establish that the off-set or nearby operators were being damaged as the result of such unit operation.

This matter is now again before the Commission as the result of an application filed by Sam M. Richardson, Jr., et al in behalf of the parties specifically named therein and as an alleged class action for and in behalf of all other parties directly or indirectly affected The provisions of initial Order Reference No. 49-70 and the Exhibits and evidence introduced pursuant thereto were made a part of such application by reference. Furthermore, the entire transcript and hearing in Docket Reference No. 9-76 was likewise made a part of the record in the instant hearing. The petitioners in such application as currently filed alleged that the operations in carrying out the development of the unitization have been and or being conducted in such manner as to endanger the production of off-set operators and nearby operators. It was further alleged that the production of said offset and nearby operators has been adversely affected and reduced and that the operations of the unit have resulted in increased operating expenses for petitioners who requested that Order Reference No. 49-70 be withdrawn and the unit terminated or in the alternative that appropriate provisions be made for the payment of damages for any decreased or affected production of said petitioners and members of the class whom they purported to represent.

At the outset of such special hearing, Chairman James D. Reynolds disqualified himself voluntarily at which time a letter of appointment was introduced as Commission Exhibit 1 for purposes of evidencing the authority of William J. Wynne to act as a Commissioner specially for such matter. The petitioners were represented by William I. Prewett, Esquire, as counsel, and the respondents, Phillips Petroleum Company and the non-operating parties within

said unitized area were represented by Joe D. Woodward, Esquire, as counsel. Additionally, Ms. Elizabeth Harris appeared as co-counsel with Mr. Woodward on behalf of Phillips Petroleum Company by whom she is employed. The written response of respondents to said application was filed by Mr. Woodward and made a part of the record.

Preliminary statements were made on behalf of the respective parties and the challenges of the jurisdiction of the Commission as made on behalf of the respondents were overruled. Counsel for the petitioners clarified the request for relief contained within the application filed on their behalf by stating tht they were not asking that Order Reference No. 49-70 be revoked but simply that it be clarified to specifically set forth additional protection for off-set operators and to indicate that in the event the unitized area was not operated as required and specified thereunder then that unit operation be suspended until such time as they were conducted in conformity therewith. The acting Chairman of the Commission likewise overruled the contention made on behalf of respondents that Order Reference No. 9-76 was res judicata with respect to operations conducted prior thereto.

Counsel for the respective parties thereupon specifically approved the Commission as constituted and waived any objection to the participation of any acting member thereof. The Affidavit of Proof of Publication was introduced and identified as Applicants' Exhibit No. 1 whereupon A.T. Slagle was called as a witness to testify on behalf of the applicant. His qualifications as an expert in the field of petroleum engineering were established and he then testified concerning the operation of the unit area as Area Superintendent for Phillips Petroleum Company. The

applicants thereafter called Mr. Jim E. Crisman who testified as an adverse witness in his capacity as Director of Reservoir Engineering and Unitization for Phillips Petroleum Company. Thereafter Messrs. Sam M. Richardson, Jr., Eric Richardson, Ed Peckan and Joe R. May testified as owners and operators of off-set or nearby leases. Mr. Henry C. Coutret, Jr., was then called to testify on behalf of applicants as an expert in the field of petroleum engineering and during the course of his testimony, Applicants' Exhibit No's. E-1 to E-16, inclusive, were introduced and received into evidence. Therafter, Messrs. David Reynolds, William H. Byrd and J.S. Beebe appeared and testified on behalf of applicants. Each said witness was likewise cross-examined by counsel on behalf of the respondents and each witness was otherwise questioned by the Commission. The case as presented by applicants was thereupon concluded. Counsel for the respective parties then concurred in the request that said hearing be adjourned and reconvened at the regular hearing scheduled to be held in November at Hot Springs.

Such public hearing thereafter reconvened on November 28, 1979 at which time said parties were represented by their respective counsel referred to above. Essentially all of the 154 separate Exhibits which were introduced during the course of testimony by the respective witnesses called to testify on behalf of the respondents, had been re-filed with the Commission on November 20, 1979. A copy of each was furnished to Mr. Prewett as counsel for and on behalf of the applicants at the commencement of such hearing following which respondents called Messrs. Harvey J. Robinson, Paul R. Stapp, Victor L. Hayes, Jim E. Chrisman and Raymond K. Watts to testify in the capacity as a reservoir engineer, organic chemist concerned with

research and development, expert in metallurgical engineering and corrosion control, Director of Reservoir Engineering and Unitization and corrosion control expert, respectively. Each said witness was cross-examined by counsel appearing on behalf of applicants and by the Commissioners. At the conclusion thereof, applicants called Messrs. J.S. Beebe, Jr. and Henry C. Coutret, Jr. to testify as rebuttal witnesses in further support of said application. Closing statements were then made by counsel for the respective parties at the completion of which said hearing was concluded on November 29, 1979.

FINDINGS OF FACT:

From the evidence introduced at said hearing, the Commission finds:

1. That due notice of said hearing and of the continuation thereof was given by publication and by mailing notices thereof more than ten (10) days prior thereto in the manner and form prescribed by law and in conformity with the rules and regulations of said Commission.

2. That the Commission has jurisdiction over said parties and of the subject matter herein.

3. That an area comprised of 985 acres as located within the Smackover Field in Ouachita County, Arkansas, has previously been unitized for the production of oil and/or gas from the Nacatoch Formation by Order Reference No. 49-70 as entered under date of September 16, 1970.

4. That Phillips Petroleum Company was designated as the Operator of the aforesaid unit area under the provisions of said Order Reference No. 49-70 and such

Operator has prepared and filed with the Commission the reports required thereunder containing the data as specified.

5. That Order Reference No. 49-70 requires that the operations in carrying out the development of the unitization shall be conducted in such manner as not to endanger the production of off-set operators or nearby operators and requires that said docket be kept open to consider any claims of discrimination or hardship and to afford administrative relief, if possible, and to hear any pertinent evidence concerning this matter.

6. That applicants herein did file their application alleging that the unit operations had been conducted in a manner to endanger the production of off-set or nearby operators so as to thereby invoke the jurisdiction of this Commission which had otherwise been specifically retained.

7. That the total evidence presented at said hearing is insufficient to establish that the production of such off-set or nearby operators has been endangered or otherwise damaged as the consequence of the conduct of the operations in carrying out the development of the unitization.

8. That the application as filed and which is the subject matter hereof should be denied; provided, however, that the staff of the Commission should be directed to investigate and determine a testing procedure for presentment at the January hearing for purposes of monitoring the movement of fluid and/or gas materials within the Nacatoch Formation within the unit area known as the SNS-985 Unit which the respondent, Phillips Petroleum Company, is operating as Operator; and that the docket in this matter shall be kept

open and maintained for purposes of receiving further testimony and evidence herein and the jurisdiction of this Commission shall be retained for all purposes.

CONCLUSIONS OF LAW:

1. That due notice of said hearing and of the continuation thereof was given by publication and by mailing notices thereof more than ten (10) days prior thereto in the manner and form prescribed by law and in conformity with the rules and regulations of said Commission.
2. That the Commission has jurisdiction over said parties and of the subject matter herein.
3. That Order Reference No. 49-70 requires that the operations in carrying out the development of the unitization shall be conducted in such manner as not to endanger the production of off-set operators or nearby operators and requires that said docket be kept open to consider any claims of discrimination or hardship and to afford administrative relief, if possible, and to hear any pertinent evidence concerning this matter.
4. That applicants herein did file their application alleging that the unit operations had been conducted in a manner to endanger the production of off-set or nearby operators so as to thereby invoke the jurisdiction of this Commission which had otherwise been specifically retained.
5. That the total evidence presented at said hearing is insufficient to establish that the production of such off-set or nearby operators has been endangered or otherwise damaged as the consequence of the conduct of the operations in carrying out the development of the unitization.

ORDER:

It is, therefore, by the Commission ordered that the application as filed herein be and the same is denied. The Commission further orders and directs that the staff of the Commissioon investigate and determine a testing procedure for presentment at the January hearing for purposes of monitoring the movement of fluid and/or gas materials within the Nacatoch Formation within the unit area known as the SNS-985 Unit which the respondent, Phillips Petroleum Company, is operating as Operator; and that the docket in this matter shall be kept open and maintained for purposes of receiving further testimony and evidence herein and the jurisdiction of this Commission shall be retained for all purposes.

All interested parties being represented at said public hearing and at the Adjudicatory Session publicly held at the conclusion thereof were thereby advised of the ruling of the Commission upon the aforesaid application and this Order shall therefore be deemed efffective from and after November 29, 1979.

ARKANSAS OIL AND GAS COMMISSION

Ralph A. Dumas, Director of
Production and Conservation

It is so ordered by the Commission:

William J. Wynne, Acting Chairman
Thomas C. Mueller, Vice Chairman
Ned R. Price
E. Boyd Alderson
C.G. Davis
James O. Staggs
Hayes C. McClerkin

APPENDIX H

ARKANSAS OIL AND GAS COMMISSION
El Dorado, Arkansas

IN THE MATTER OF: Ref. No. 49-70 and
Unit Operation, Nacatoch Sand Formatior
of Smackover Field, Ouachita County,
Arkansas and related mattes.

NO. _____

APPLICATION

1. Petitioners herein are specifically as follows:

    1. Sam M. Richardson, Jr. and SEDCO;
    2. J.S. Beebe, Sr. and J.S. Beebe, Jr.;
    3. Berg, Laney & Brown;
    4. Joe R. Mays;
    5. Jack Washington;
    6. Orlis Daniels of Rutledge and Daniels; and
    7. All other parties directly or indirectly affected by the operation of the Nacatoch Sand Formation Unit.

2. Petitioners herein are each owners of an oil and/or gas interest in the immediate area of the property described in Reference No. 49-70 dated September 16, 1970, of the Arkansas Oil and Gas Commission and either operate or have an interest in an oil and/or gas well affected by the operations of the unit described in Reference No. 49-70. This petition is filed in behalf of the parties specifically named and as a class action for and in behalf of all other parties directly or indirectly affected.

3. The provisions of Reference No. 49-70 and the exhibits thereto and evidence introduced pursuant thereto are made a part of this application by reference to the records of the Commission.

4. The operations in carrying out the development of the unitization have been and are being conducted in such manner as to endanger the production of offset operators and nearby operators.

5. The operations of Phillips Petroleum Company as the operator of the unit area have been conducted in such a manner as to discriminate against offset and nearby operators and owners and have caused hardship in that the production of offset operators and nearby operators has been adversely affected and reduced. The operations of the unit have resulted in increased operating expenses for petitioners.

6. Petitioners request that Reference No. 49-70 be withdrawn and the unit terminated as the method of proposed operation cannot be conducted whereby it will not adversely affect offset and nearby operators. In the alternative, appropriate provision should be made for payment of damages for any decreased or affected production of offset and/or nearby operators and Reference No. 49-70 and all other orders relating to the operation of the unit referred to in said 49-70 be modified to provide specific and detailed protection for all offset and nearby operators and owners.

WHEREFORE, petitioners pray that a hearing be scheduled and after hearing, that relief be granted to petitioners as herein set forth and that all other appropriate and proper relief be granted to them and to each of them.

Petitioners further pray that this petition be treated as a class action in behalf of all similarly affected parties.

/s/ Wm. I. Prewett
Attorney for Petitioners

Wm. I. Prewett
Brown, Compton & Prewett
423 North Washington
El Dorado, AR 71730

VERIFICATION

Wm. I. Prewett, being duly sworn, states on oath that he is the attorney for the herein named petitioners and that the statements set forth in the foregoing Application are true and correct as he verily believes.

/s/ Wm. I. Prewett
William I. Prewett

SUBSCRIBED AND SWORN to before me, a Notary Public within and for Union County, Arkansas, on this 5th day of July, 1979.

/s/ [Illegible]
Notary Public

My Commission Expires:
11-15-81

APPENDIX I

ARKANSAS OIL AND GAS COMMISSION
EL DORADO, ARKANSAS

REFERENCE NO. 9-76 March 15, 1976

Smackover Field
Nacatoch Sand

RE: APPLICATION OF N.T. RUTLEDGE, JOE R. MAY, BERG, LANEY AND BROWN, O.B. DANIELS, JACK WASHINGTON, TENNYSON OIL COMPANY ET AL FOR AN ORDER REQUIRING THAT INJECTION OF AIR BE DISCONTINUED.

After due notice followed by public hearing held in Hot Springs, Arkansas, on February 25, 1976, and recessed until March 15, 1976, in El Dorado, Arkansas, the undersigned members having been regular members of the Commission together with specially appointed members of the Commission by the Governor of Arkansas for the special purpose of hearing this case and this case only, have made the following findings of fact and conclusions of law.

FINDINGS OF FACT:

1. The applicants are offsetting and nearby operators of Phillips Petroleum Company's "Smackover Nacatoch Sand 985 acre unit in Ouachita County, Arkansas," which unit was established and authorized by Order of the Arkansas Oil and Gas Commission, No. 49-70, dated September 16, 1970.

2. That Monsanto Company, Gulf Oil Corporation, Kerr-McGee Corporation, Richard Vickers, Sara Nell Humphreys, Bettye V. Gray and Phillips Petroleum Company are the owners of the "Smackover Nacatoch

Sand 985 acre unit in Ouachita County, Arkansas" and that Phillips Petroleum Company is designated as the operator.

3. That the "Smackover Nacatoch Sand 985 acre unit, Ouachita County, Arkansas" was formed and is operated under the terms of the aforementioned Order of the Arkansas Oil and Gas Commission, No. 49-70, dated September 16, 1970, and a plan of unitization, Smackover Nacatoch Sand (985 acre unit) Ouachita County, Arkansas, was approved by the Commission.

4. That the nature of the proposed unit operation was set forth in detail in the application of Phillips Petroleum Company and the owners of said unit and among other things, specifically provided under Sub-paragraph C that the working interest owners operating through the unit operator "will be authorized to control and alter pressures within the proposed unit area, to inject steam and other substance or substances therein, . . . And the Order of the Arkansas Oil and Gas Commission, Reference No. 49-70, above referred to, also provided "that the parties owning the operating rights in said unit area are to engage in thermal type recovery operations employing injection of steam or other substances, provided, however, such operating parties shall have the right, subject to the notification of this Commission, to discontinue in whole or in part any method of operation which, in their opinion, is no longer in accord with good engineering or production practices. The plan of operation presented at the Hearing is hereby approved."

5. That the operator, Phillips Petroleum Company, has

filed monthly reports with the Arkansas Oil and Gas Commission furnishing all the pertinent data with respect to injection volumes by substance, pressure information, methods of operation, and other pertinent information pertaining to the operation of said unit.

6. That during the fall of 1973, the operator, Phillips Petroleum Company, commenced the injection of water and air into the unit in addition to steam and all subsequent reports filed with the Commission have contained all pertinent information in relation thereto.

7. That the purpose of air injection along with the steam injection was for pressure backup with water as an additional pressure backup.

8. That the alternate or simultaneous injection of steam and air reduces overall injection costs per acre flooded and improves the overall efficiency of the steam injection and recovery of hydrocarbons from the reservoir underlying the unit by producing more efficient usage of heat and energy and reducing undesirable heat losses.

9. That volumes of air injected by the operator, Phillips Petroleum Company, are substantially equal to the volumes of air actually produced from the wells within the 985 acre unit and there is no substantial encroachment of the air injected by the operator on the offsetting or nearby wells.

10. That the Nacatoch Sand has operated on a vacuum since early 1930's and that huge amounts of air have penetrated the formation and reservoir and that air injection by the operators of the unit does not substantially alter the present day condition of the reservoir.

11. That the Nacatoch Sand is in advanced stages of depletion and operational problems of the operators throughout the Smackover Field have become increasingly difficult over the years and evidence indicates that production problems will become increasingly difficult as the field reaches final, ultimate, depletion.

12. That Paragraph 6 of Order No. 49-70 referred to above required that the operations in carrying out the developments of the unitization of the Smackover Nacatoch Sand 985 acre unit were required to be conducted in such a manner as not to endanger the offset operators or nearby operators.

CONCLUSIONS OF LAW:

1. That the applicants have failed to prove that they have experienced increasing and irreparable damage to their offset wells producing from the Nacatoch Sand as a result of the operations of Phillips Petroleum Company in operating its 985 acre Smackover Nacatoch Sand Unit and to the contrary, the operator, Phillips Petroleum Company, has proven that any difficulties and operational problems experienced by the offsetting or nearby operators from the Nacatoch Sand have not been caused by the injection of air into its 985 acre unit or any other portion of its operation of said unit.

2. That the applicants have failed to prove that unit operations of the Smackover Nacatoch Sand 985 acre unit is in violation of any of the Orders of the Arkansas Oil and Gas Commission and to the contrary, Phillips Petroleum Company has proven that its operation

of its Smackover Nacatoch Sand 985 acre unit is not in violation of any of its Orders.

3. **That no action is necessary at this time to protect the production of offset or nearby operators from the operations of said unit.**

ORDER:

Now, therefore, it is ordered:

1. That the application of N.T. Rutledge, Joe R. May, Berg, Laney, and Brown, O.B. Daniels, Jack Washington and Tennyson Oil Company et al, Reference Docket No. 9-76 before the Arkansas Oil and Gas Commission, is denied.

2. That the Petitioners or any other interested party may file a new application upon a showing that new evidence not shown at this Hearing can be produced by the applicants or any other interested party.

3. That upon a showing by any of the Petitioners or any interested party that evidence is being unreasonably withheld by the unit operator and is unavailable from any other source except the unit operator, then application may be filed with this Commission citing such matters and this Commission shall retain jurisdiction in the matter to make such reasonable Orders as are necessary to carry out the intention of the original Order of this Commission.

This Order shall be effective from and after March 15, 1976.

ARKANSAS OIL AND GAS COMMISSION

By:_____
Ralph A. Dumas, Director of
Production and Conservation

It is so ordered by the Commission:

Ned A. Stewart, Jr. - Vice-Chairman
Thomas C. Mueller
James O. Staggs
James O. Jones
Dorsey M. Ryan
Spence A. Leamons
Kenneth B. Estes

APPENDIX J

RULE 28.1 LIST

PHILLIPS PETROLEUM COMPANY'S DIRECT AND INDIRECT SUBSIDIARIES AND AFFILIATES OWNED LESS THAN 100%*

ALESKA PIPELINE SERVICE COMPANY

ARCTIC LNG TRANSPORTATION COMPANY

CANADA WESTERN CORDAGE COMPANY, LIMITED

CANYON REEF CARRIERS, INC.

CHISHOLM PIPELINE COMPANY

COCHIN REFINERIES LIMITED

COLONIAL PIPELINE COMPANY

DIXIE PIPELINE COMPANY

EAST TEXAS SALT WATER DISPOSAL COMPANY

EXPLORER PIPELINE COMPANY

GREAT YARMOUTH PORT LABOUR COMPANY LIMITED

HEAT TRANSFER RESEARCH, INC.

IRANIAN MARINE INTERNATIONAL OIL COMPANY – IMINOCO

KENAI LNG CORPORATION

LONG BEACH OIL DEVELOPMENT COMPANY

MULTINATIONAL GAS AND PETROCHEMICAL SERVICES LIMITED

NORLAND GMBH FUR GRUNDBESITZ UND INDUSTRIEANLAGEN

NORPIPE A.S

NORPIPE PETROLEUM UK LIMITED

NORSEA GAS A/S

NORSEA GAS GMBH

NORSEA PIPELINE LIMITED

OIL INSURANCE LIMITED (NEW)

PAPAGO CHEMICALS, INC.

PHILLIPS CARBON BLACK COMPANY (PROPRIETARY) LIMITED

PHILLIPS CARBON BLACK ITALIANA S.P.A.

PHILLIPS CARBON BLACK LIMITED

PHILLIPS EXTRUDED PRODUCTS – LES PRODUITS EXTRUDES PHILLIPS

PHILLIPS PETROLEUM CHEMICALS

PHILLIPS PETROLEUM INTERNATIONAL ANDINA, S.A.

PHILLIPS PETROLEUM INTERNATIONAL S.P.A.

PHILLIPS PETROLEUM SINGAPORE CHEMICALS (PRIVATE) LIMITED

PHILLIPS PETROLEUM TANKER MANAGEMENT, LIMITED

PHILLIPS PETROLEUM TORAY INC.

PHILLIPS-IMPERIAL PETROLEUM LIMITED

POLAR LNG SHIPPING CORPORATION

RENOLIT – HAUS GMBH

SOLAR GAS, INC.

SPODCO LIMITED

SPODCO-USA, INC.

THE SALK INSTITUTE BIOTECHNOLOGY/
INDUSTRIAL ASSOCIATES INC.

VENEZOIL, C.A.

WALTON INSURANCE LIMITED

WESTERN DESERT OPERATING PETROLEUM
COMPANY (WEPCO)

WHITE RIVER SHALE OIL CORPORATION

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*Does not include companies required to issue one or more shares to directors or officers.